YELLOW POPLAR LUMBER CO. et al. *v.* THOMPSON'S HEIRS et al.

Sept. 10, 1908.

[62 S. E. 358.]

1. Appeal and Error—Proceedings Not in Record—Impeaching Record—Affidavits.—To show that a bill of exceptions included in the record certified April 30th as being a true transcript of the record was not made a part of the record on appeal, defendant in error offered affidavits by the clerk of the lower court to the effect that the evidence and instructions, as well as the clerk's certificate thereto, were written up and forwarded to counsel for plaintiff in error before the bills of exceptions, signed by the judge, dated May 11th, were filed in the clerk's office, which was on May 1st by plaintiff in error, and were never before in his office. Supreme Court of Appeals Rule 1 (57 S. E. p. xiv) provides that the court will not read any affidavit in support of, or opposition to, any motion, unless reasonable notice in writing be given to the opposing party of the time and place of taking same. No notice of taking such affidavits was given to plaintiff in error; the motion to dismiss the appeal which they were offered to support being made in a printed brief, filed only several days before the hearing on appeal. Held, that the certificate to the record brought up was a verity as to the clerk, and the affidavits could not be considered to impeach or change it.

2. Taxation—Assessment—Misdirection of Owner—Effect.—If the assessment of land belonging to "James T." under the name of "Jane T.," and a note on the land book opposite the assessment, "not James T.," did not in fact mislead James T., he may not avoid the sale of the land for taxation on the ground of the erroneous description.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 45, Taxation, § 701.]

3. Same—Actions to Try Title—Question for Jury—Effect of Misdescription.—In ejectment to recover land sold for taxes, whether the erroneous description of the owner on the land book, as "Jane T.," instead of "James T.," and a note on the book opposite the assessment that it was "not James T.," was sufficient to mislead the latter and prejudice his right, was for the jury; and it was error to instruct that such mistake was immaterial.

4. Adverse Possession—Color of Title—Sufficiency of Instrument to Constitute Color.—An instrument is sufficient to constitute color of title in adverse possession if it is regular on its face, and the grantee is ordinarily not required to go beyond the writing to determine whether it actually passes title or is void; a rightful title not being essential.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 1, Adverse Possession, § 395.]

5. Same—Color of Title—Void Tax Deed—Sufficiency.—A tax deed gives color of title, though informal or defective, or even if absolutely void, unless the land in controversy is so insufficiently described as to render the identification impossible; and hence it was error to refuse an instruction that a void tax deed sufficiently describing the property was sufficient color of title to support adverse possession if the other elements of adverse holding existed.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 1, Adverse Possession, § 462.]

6. Same—Duration of Possession—Beginning of Adverse Possession—Running of Limitations.—Limitations begin to run in adverse possession under a tax deed only from the date of the possession under the deed.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 1, Adverse Possession, § 207.]

7. Taxation—Tax Deeds—Time of Issuing.—The power to issue a tax deed does not arise until after the expiration of the period allowed for redemption.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 45, Taxation, § 1496.]

8. Appeal and Error—Review—Harmless Error—Affecting Party Not Entitled to Succeed.—Error in holding that a void tax deed was not sufficient color of title to support adverse possession was harmless where the evidence showed that the one claiming under it had not held possession for the entire statutory period.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 3, Appeal and Error, §§ 4035, 4036.]

9. Adverse Possession—Continuity of Possession—Tacking Successive Possessions.—Defendant's grantors entered into adverse possession of land in May, 1893, and in May, 1902, conveyed the land to O., and conveyed a number of trees standing thereon by separate deed to defendant, the latter deed providing that defendant might remove the trees when it chose, and the grantor would protect the timber as long as it remained on the premises. Held, that the separate conveyance of the trees to defendant was a severance of them from the estate in the surface of the land, and the grantor's agreement to protect the trees did not constitute defendant and the grantee of the land privies in estate, so as to tack the latter's possession to defendant's possession of the trees to complete the 10 years' adverse possession required by the statute.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 1, Adverse Possession, § 217].

10. Same—Necessity—Privity.—Privity must be shown before possession can be tacked, so as to complete the statutory period for adverse possession.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 1, Adverse Possession, § 216.]

11. Same—Elements of "Adverse Possession."—Adversary possession must be actual, exclusive, open, and notorious and continued for the statutory period, accompanied by bona fide claim of title against all others, and mere naked possession without claim of right, however long continued, cannot ripen into a good title, but is regarded as for the benefit of the true owner.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 1, Adverse Possession, §§ 65-76.

For other definitions, see Words and Phrases, vol. 1, pp. 227-235; vol. 8, p. 7568.]

12. Logs and Logging—Sale of Standing Timber—Effect of Sale.—Though trees, unlike minerals, draw their support from the soil until removed, and so long as they are standing are real estate, they may be created a separate and distinct estate from the estate in the land; and, where they are separated by conveyances or reservation from the ownership of the surface, there is no presumption that they belong to the owner of the surface, and hence, where standing trees were conveyed to defendant, and the land conveyed to another by separate conveyance, the latter's possession was only of the land.

13. Mines and Minerals—Title—Conveyances—Severance from Ownership of Surface.—It is a general presumption that the possessor of the surface also has possession of the subsoil; but, when minerals have been severed from the owner of the surface by conveyance or reservation, the surface owner can acquire no right in the minerals by his exclusive possession of the surface, nor does the owner of the minerals lose his right or possession by any length of nonusage, except by a disseisure, which actually takes the minerals out of his possession.

CHESAPEAKE & O. RY. CO. *v.* ROWSEY'S ADM'R.

Sept. 15, 1908.

[62 S. E. 363.]

1. Appeal and Error—Harmless Error—Error Cured—Overruling Demurrer.—Any error in overruling a demurrer to particular counts of a declaration is cured by an instruction to the jury not to consider such counts.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 3, Appeal and Error, §§ 4098-4105.]

2. Master and Servant—Action for Death of Employee—Pleading—Sufficiency.—Allegations in an action against a railway company for the death of a brakeman, struck by an overhead bridge, that the company negligently failed to use proper care to provide a reasonably safe place for decedent to discharge his duties, and in the construction